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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1666

PARAMOUNT FILM DISTRIBUTING CORPORATION,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF CLAIMS TO REVIEW THE NON-FINAL JUDGMENT OF THE NEW YORK STATE COURT OF APPEALS

Appearances for Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF CLAIMS TO REVIEW THE NON-FINAL JUDGMENT OF THE NEW YORK STATE COURT OF APPEALS

The petition of Paramount Film Distributing Corporation respectfully prays for the grant of a writ of certiorari to issue from the final judgment of the New York State Court of Claims to review the non-final judgment and the opinion of the Court of Appeals of the State of New York which directed further judicial action on its remand to the Court of Claims. Final judgment has been entered in the Court of Claims conforming to that direction.

Opinions Below

The majority and dissenting opinion of the Court of Appeals of the State of New York are reported at 30 NY 2d 415 and appear in the Appendix hereto as Exhibit A. The decision of the State of New York Court of Claims (Alpert, J.) directing entry of final judgment on remand is not reported and it is set forth in the Appendix to this petition as Exhibit B. The majority and dissenting opinions of the Appellate Division of the Supreme Court of the State of New York, on its review after trial, granting the judgment which was reversed by the Court of Appeals are reported at 37 AD 2d 226 and appear commencing at page 544 of the Record on Appeal before the State of New York Court of Appeals, submitted herewith. The decision of the Court of Claims in support of its original final judgment which was modified by the Appellate Division is unreported and appears at page 10 in the Record on Appeal. Reargument of this original decision was granted by the Court of Claims and on reargument a decision was entered adhering to the prior decision and opinion. This decision was not reported and it appears in the Record on Appeal at page 14.

A preliminary motion to dismiss the claim herein was denied in an unreported opinion by the Court of Claims (Record on Appeal, page 403) and this denial was affirmed with an opinion and dissenting opinion which are reported at 27 AD 2d 420 and appear in the Record on Appeal at pages 428 and 433.

Jurisdiction

The non-final judgment of the Court of Appeals of the State of New York (Appendix, Exhibit C) sought to be reviewed was entered on June 8, 1972. In August, 1972,

within the 90 days limited, petitioner served a motion in the Court of Appeals for reargument and to amend that court's remittitur. On September 28, 1972 the Court of Appeals denied the motion for reargument but entered an order (Appendix, Exhibit D) amending its remittitur by adding to it the following: "Upon the appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: Whether lack of a remedy in one proceeding rather than two to declare the licensing statute invalid and also to obtain a refund of licensing fees already paid violates the due process clause of the Fourteenth Amendment. The Court of Appeals considered this issue and held that there was no denial of claimant's constitutional rights (30 NY 2d 415)."

The effect of the Court of Appeals' decision on the merits was to say that no recovery could be had of fees paid under an unconstitutional statute unless they were expressly paid under protest or that such payments were resisted by judicial action. The opinion and judgment interlocutorily determined only that there was no resistance by judicial action but that some fees had been paid under protest. No part of the claim was finally disposed of. Instead the whole matter was remanded to the Court of Claims with directions to determine the amount of fees paid under protest. Upon the return of claimant's motion to set the matter down for a hearing, counsel stipulated the amount of fees paid under protest and final judgment was entered, granting claimant a recovery of $341 plus interest and dismissing the claim in all other respects (Appendix, Exhibit E). Because of this stipulation, no further appeal in the State courts was available from the amount of the judgment.

Following entry of judgment in the Court of Appeals a non-final judgment for costs only was entered in the Court of Claims (Judgment entered June 16, 1972, Ap-

pendix, Exhibit F). Another judgment, ineffective for any other purpose and also non-final, was entered in the Court of Claims on October 27, 1972 amending the judgment entered June 16, 1972 to recite the addition to the Court of Appeals' remittitur (Appendix, Exhibit G).

Up to the time final judgment was entered in the Court of Claims on March 13, 1973, neither the judgment of the Court of Appeals nor any of the judgments of the Court of Claims (recited above) even purported to dispose of the claim in a final way (*California National Bank* v. *Stateler*, 171 U.S. 447; *Sand Springs Home* v. *Naharkey*, 299 U.S. 588; *Laclede Gas Light Co.* v. *Public Service Comm.*, 304 U.S. 398; *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69; *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62).

Final judgment was entered in the New York Court of Claims on March 13, 1973.

This Court's juridiction is invoked under 28 U.S.C. §1257 (3).

Questions Presented

1. Whether a State may, without denying due process of law guaranteed under the Fourteenth Amendment of the Constitution of the United States, retain fees charged under an unconstitutional motion picture licensing statute (New York Education Law; §§120-132) containing express criminal sanctions for failure to obey (Education Law, §§129-132), on the grounds (a) the void censorship system resorted to was somehow beneficial to petitioner; (b) no suit was brought to resist payment; and (c) the fees were not paid under formal protest where New York State law offered no single judicial or other action which would provide adequate remedy and payment of the fee under protest would endanger or delay the issuance of a

license and no refund could possibly have been made except after subsequent resort to an unreasonable multiplicity of suits.

2. Whether a State may, without denying due process of law guaranteed under the Fourteenth Amendment of the Constitution of the United States, require a film distributor, forced by threat of arrest and criminal prosecution to pay licensing fees under an invalid system of administrative pre-censorship, expressly to protest each fee payment and then bring a plenary action in the New York Supreme Court to declare the film licensing statute invalid while, at the same time, because of the six month statute of limitations for filing claims, file a claim in the New York Court of Claims for each small fee paid in the meantime.

3. Whether it is a denial of the equal protection and due process guaranteed by the Fourteenth Amendment of the Constitution of the United States for a State to refuse the refund of film licensing fee payments on the ground of voluntary payment, as a matter of law, by applying standards of law contrary to prior State decisions based on the State courts stated reasons that the fees were relatively small and that the grant of licenses, even by unconstitutional procedures of pre-censorship, were somehow beneficial to petitioner, a large film distributor.

Statement of the Case

Petitioner here filed a claim in the New York Court of Claims seeking refund of the motion picture license fees which it was required, if it would remain in business free from criminal prosecution, to pay under the New York Education Law (§§120-132) which statute had been subsequently declared unconstitutional. The Court of Claims awarded your petitioner $29,297 and on appeal to the

New York State Supreme Court, Appellate Division, Third Department, that award was increased to $128,322.50. The New York Court of Appeals (4-3) reversed that award and remanded the matter to the Court of Claims to determine the amount of fees paid under express protest with directions that it award judgment in that amount.

The effect of the reversal by the Court of Appeals, as found on remand by the Court of Claims, was to reduce the refund awarded from $128,322.50 to $341, protests having been filed only after the announcement of this Court's ruling in *Freedman* v. *Maryland* (380 U.S. 51) when the parties should no longer have been mutually mistaken as to the validity of the New York statute.

The majority opinion of the New York Court of Appeals established new prerequisites for negativing the defense of voluntary payment of fees which ignore the statutorily defined effect of mistake of law (New York Civil Practice Law and Rules, §3005; *Five Boro Electrical Contractors Association* v. *City of New York*, 12 NY 2d 146; *Mercury Machine Importing Corporation* v. *City of New York*, 3 NY 2d 418) and the business duress inherent in the statute (*Five Boro Electrical Contractors Association* v. *City of New York, supra; Swift & Company* v. *United States*, 111 U.S. 22) and as augmented by criminal sanctions for violators (New York Education Law, §§129, 131, 132). Voluntary payment was not found as a fact because the opposite was found in the trial court and in the Appellate Division and the New York Court of Appeals had no jurisdiction to disturb affirmed findings. Instead, it was imposed because, the majority of the New York Court of Appeals supposed, (1) Paramount Film Distributing Corporation was a large distributor with access to counsel; and (2) film licensing and pre-censorship, though the New York scheme therefor was unconstitutional, were for the public good and film distributors benefited from receiving licenses (*Paramount Film Distributing Corporation* v. *State*, 30 NY 2d 415, Appendix, Exhibit A).

REASONS FOR GRANTING THE WRIT

1. The requirement that payment be resisted by judicial action to negative the defense of voluntary payment denies petitioner equal protection and due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

In *Freedman* v. *Maryland* (380 U.S. 51) this Court declared constitutionally invalid a scheme for administrative motion picture pre-censorship under which exhibition of a film could be barred, on the censor's say-so alone, without judicial action, and in *Trans-Lux Distributing Corp.* v. *Board of Regents* (380 U.S. 259) this Court reversed a judgment of the New York Court of Appeals upholding the validity of the New York film censorship statute and remanded the cause to the New York State Court of Appeals for further proceedings. On remand the Court of Appeals directed judgment declaring the whole of New York's film licensing statute (Education Law, Part II, Article III, Title I) to be violative of the Fourteenth Amendment of the Constitution of the United States (*Matter of Trans-Lux Distributing Corp.* v. *Board of Regents*, 16 NY 2d 710).

Paramount Film Distributing Corporation had for years complied with that statute and paid the fees exacted by the censor.

Under New York law no cause of action for refusal of the film licensing fees paid under the void statute accrued until one single, adequate remedy was available before a competent forum (*Homer Engineering Co. Inc.* v. *State of New York*, 12 NY 2d 508, 510-511). No single remedy was available to Paramount Film Distributing Corporation until the event of the authoritative striking down of the film licensing statute by this Court and Court of Appeals because in any permissible action in the New

York Supreme Court against the Board of Regents, no refund of the fees paid could be directed by money judgment or otherwise (*Matter of Psaty* v. *Duryea*, 306 NY 413; *Matter of Samuel Adler, Inc.* v. *Noyes*, 285 NY 34 and 625). On the other hand, in a suit on a claim for refund in the New York Court of Claims, that Court was without jurisdiction to declare the film licensing statute unconstitutional for lack of equity powers (*Matter of Psaty* v. *Duryea, supra*).

Against vigorous argument by the State that the claim should be dismissed for lateness, the Court of Appeals held, necessarily, that no cause of action accrued until the decision in *Matter of Trans-Lux Distributing Corp.* v. *Board of Regents* on June 10, 1965 (16 NY 2d 710) and that the present action was, therefore, timely commenced.

Nevertheless dismissal of practically the whole of the claim has been decreed by the Court of Appeals for failure to initiate a series of judicial actions not yet accrued and for failure to register protest. Both grounds deny Paramount Film Distributing Corporation due process and equal protection of the law under the Fourteenth Amendment of the Constitution of the United States in that they deprive it, for impermissible reasons, of the same relief from mistake of law available to all other persons [New York Civil Practice Law and Rules, §3005 (formerly Civil Practice Act, §112-f); see *Five Boro Electrical Contractors Association, Inc.* v. *City of New York*, (12 NY 2d 146) in which involuntariness was based on mistake of law as to fees and *Mercury Machine Importing Corp.* v. *City of New York* (3 NY 2d 418) in which the mistake of law statute was held inapplicable to tax payments as distinguished from fee payments].

The rationale of the Court of Appeals majority opinion is that each of the fees was relatively small for such a large film distributor with a staff of lawyers, and, that

in spite of the unconstitutional, harrassing risk that any film might arbitrarily be denied a license, the successful acquisition of a license conferred some beneficence upon the licensee in any event, thereby reestablishing the validity of the licensing procedures stricken down by this Court and by the New York Court of Appeals as unconstitutional.

2. The requirement that payment be accompanied by protest to negative the defense of voluntary payment denies petitioner equal protection and due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Similarly, with respect to protest, one under a mistaken apprehension as to the validity of a statute is uniquely deprived, *ex post facto*, absent any existing requirement of protest, of his right to rely on that mistake of law as accorded to all suitors by express enactment. More offensive to the requirements of due process is the arbitrary establishment, in this one case, of the prerequisite of affirmative but vain acts to establish involuntary payment of fees. Even if the Board of Regents agreed wholly with the basis of a fee payer's protest it had no power to refund the payment (*Matter of Samuel Adler, Inc.* v. *Noyes*, 285 NY 34), and the tacking on of a protest to the State prescribed form of application for a license (New York Education Law, §127) would invite delay or denial (*Swift Company* v. *United States*, 111 U.S. 22, 28-29). The illegal subjection of petitioner to void film licensing procedures under threat of arrest and prosecution was so intertwined with the fees charged for operating this unconstitutional censorship scheme that the decision sought to be reviewed, which preserves the validity of the statute insofar as it levied the fees, flaunts the intendment of the decisions of this Court in *Freedman* v. *Maryland (supra)* and *Trans-Lux Distributing Corporation* v. *Board of Regents (supra)*.

3. The barriers here erected to thwart the refund of fees collected under the void censorship statute have not been applied in other voluntary payment cases and are based on a theory of some residual validity of an unconstitutional statute deemed to be for the public good.

Involuntary payment, based on mistake of law alone, was approved in *Five Boro Electrical Contractors Association* v. *City of New York* (12 NY 2d 146, 147-150) and based upon legal duress was approved in *Peyser* v. *Mayor*, (70 NY 497, 498), *Strusburgh* v. *Mayor* (87 NY 452), *Mason* v. *Prendergast* (120 NY 536) and *Ardico Realty Corp.* v. *City of New York* (250 NY 29). The same rule has been applied by this Court (*Swift & Company* v. *United States*, 111 U.S. 22; *Stratton* v. *St. Louis S.W.R. Co.*, 284 U.S. 530).

In the present case, for the first time, in the face of lower court findings of utter business compulsion and the threat of criminal prosecution, unique additional prerequisites to recovery were established.

The law is clear that equal protection and due process of law are denied by the application of a statute of limitations without grant of a reasonable time for a claim to be presented after an adequate remedy and a forum become available (*Atchafalaya Co.* v. *Williams Co.*, 258 U.S. 190; *Wilson* v. *Iseminger*, 185 U.S. 55; *Hastings* v. *Byllesby & Co.*, 293 NY 413, 419; *Gilbert* v. *Ackerman*, 159 NY 118).

No less a limitation is the bar asserted against the present claim. As held in the present case, no cause of action for refund of fees accrued until June 10, 1965 when the New York Court of Appeals determined that the whole of the motion picture censorship and licensing statute was void (*Matter of Trans-Lux Distributing Corp.* v. *Board of Regents*, 16 NY 2d 710). But, the claim of petitioner here was almost wholly dismissed for failure to commence

unspecified, non-accrued actions even though petitioner could not sue for want of an accrued cause of action in an effective forum. This bar is more of a denial of rights than the bar of time limitations.

Protest is not required by statute nor where duress or mistake of law is established. The imposition of a necessity for protest in a case where both duress and mistake of law are present as a matter of law wipes out all remedy for mistake of law and duress. A reading of the majority opinion shows clearly that this was done to preserve in part the semblance of some validity for a statute held impermissible by this Court under the Fourteenth Amendment of the Constitution of the United States in *Freedman* v. *Maryland* (*supra*) and *Trans-Lux Distributing Corp.* v. *Board of Regents* (*supra*) and held wholly void by the New York Court of Appeals (*Matter of Trans-Lux Distributing Corp.* v. *Board of Regents,* 16 NY 2d 710).

The decision below barring in the main the cause of action, before it accrued, denies petitioner equal protection and due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

CONCLUSION

For these reasons a writ of certiorari should be issued to New York State Court of Claims to review the judgment and opinion of the State of New York Court of Appeals.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this day of June, 1973 three copies of the petition for Writ of Certiorari and the Appendix thereto were mailed, postage prepaid, to Honorable Louis J. Lefkowitz, Attorney General of the State of New York, The Capitol, Albany, New York, Counsel for the Respondent. I further certify that all parties required to be served have been served.

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APPENDIX

EXHIBIT A

(Opinions of the New York State Court of Appeals)
(30 N Y 2d 415)

PARAMOUNT FILM DISTRIBUTING CORPORATION, RESPONDENT, v. STATE OF NEW YORK, Appellant. (Claim No. 45976.)

Decided June 8, 1972.

APPEAL from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered August 2, 1971, which, *inter alia*, modified, on the law and the facts, and, as modified, affirmed a judgment in favor of claimant, entered upon a decision of the Court of Claims (HENRY W. LENGYEL, J.). The modification consisted of increasing the award.

Louis J. Lefkowitz, Attorney-General (Grace K. Banoff and *Ruth Kessler Toch* of counsel), for appellant.

John R. Davison and *Walter J. Josiah, Jr.* for respondent.

BREITEL, J. Claimant, a motion picture distributor, seeks recovery of $128,322.50 in motion picture license fees paid to the State from June 10, 1959 to June 10, 1965 when the applicable statutes were nullified (Education Law, § 120-132; *Matter of Trans-Lux Distr. Corp.* v. *Board of Regents*, 16 N Y 2d 710, on remand from the United States Supreme Court, 380 U. S. 259). The fee for original films was $3.50 for each 1,000 feet of film while the fees for copies was $3 plus an additional dollar for each 1,000 feet (Education Law, § 126). Although over a six-year period the fees aggregate an impressive sum, the

fee per motion picture distributed in New York was only an inconsiderable expense compared to the cost of production, most often less than $10. Claimant had paid all but a trivial portion of the fees without protest and had not otherwise ever resisted the statutory procedure for licensing or the payment of fees.

On the prior appeal, (14 N Y 2d 88) in the Trans-Lux case, (380 U. S. 259, 16 N Y 2d 710, *supra*) this court, in upholding the denial of a motion picture license, passed only on the propriety of denying a license for the particular motion picture in suit. The validity of the licensing statute, extant in some form since 1927, its procedure, and the fees charged were not in issue. Motion picture licensing generally had been held valid by the Supreme Court, and indeed in *Freedman* v. *Maryland* (380 U. S. 51), the case upon which the *Trans-Lux* order was reversed, the Supreme Court went out of its way to observe that a requirement of prior submission of motion pictures to a licensing board need not be unconstitutional. The *Freedman* case nullified the Maryland statute only because its procedural "apparatus" violated due process in not providing for prompt judicial review. Since the New York procedure was similar to Maryland's, this court on remand declared the New York statute null (16 N Y 2d 710, *supra*).

A majority at the Appellate Division sustained claimant's right to recover all fees paid since 1959. While $128,322.50 plus interest is now involved, other cases pending bring the claims to just under $2,000,000.

As posed by the parties, the issue is whether the payments of the license fees were voluntary, or involuntary under duress entitling the payor to recover, albeit the payments were made without protest or other action to resist the payments or to recover them.

Exhibit A

Two leading New York cases mark clearly when there is a right to recover unprotested taxes or fees.

In *Mercury Mach. Importing Corp.* v. *City of New York* (3 N Y 2d 418) this court, over vigorous dissent it is true, held that corporate taxpayers who voluntarily paid an illegally levied tax without protest were not entitled to refunds although the statute under which the taxes were paid was subsequently held unconstitutional. The fulcrum of the determination was the relatively new section of the Civil Practice Act which provided that a mistake being one of law for that reason alone did not forbid recovery for mistake (§ 112-f). The taxpayers had made a mistake of law, namely, as to the validity of the taxing statute, but it was held that the mistake did not render the payment involuntary. It was pointed out that in a sense no tax is paid willingly, free from the coercion of law. The precedents were collated and classified and it is unnecessary to repeat what was done there.

In *Five Boro Elec. Contrs. Assn.* v *City of New York,* (12 N Y 2d 146) this court again in an opinion by Judge Van Voorhis, who had written for the court in the *Mercury* case (3 N Y 2d 418, *supra*), but this time with unanimous concurrence of the court, permitted the recovery of license fees paid under a city local law without protest by licensed electricians. The distinction is made that the payments then in question were involuntary and under duress, because the electricians would otherwise have been barred from engaging in their occupations. The court held that protest was not required "under the circumstances of this case * * * in view of the compulsory nature of the payment of these exorbitant license fees" (*i.d.,* at p. 149). Most important, the fees themselves had been the subject of a previous successful attack and the exaction declared unconstitutional because the amounts bore no rea-

sonable relation to the licensing and regulation of electricians under a non revenue statute (*Adlerstein* v. *City of New York*, 6 N Y 2d 740).* Again the same authorities cited in the *Mercury* case were reviewed and the distinctions there made repeated to explain the difference in result between the two cases.

The *Mercury* and *Five Boro* cases are not aberrational. They conform generally with distinctions made throughout the country between voluntary payments of taxes or fees later declared void, and the necessity for protest in the case of voluntary payments (see, generally, Restatement, Restitution, § 75, incl. Comments and Illustrations; Ann., Taxes—Involuntary Payment—Recovery, 80 ALR 2d 1040; 53 C. J. S., Licenses, § 57).

Applying the distinctions to this case, the payments by claimants were voluntary, and in the absence of protest at the time, claimant is not entitled to recover the fees it paid just because in a collateral matter on grounds not applicable to it or ever raised by it, the statute has been declared null.

The test of voluntariness in cases involving taxes and fees is sometimes elusive and difficult of application. As noted earlier by Judge Van Voorhis, all taxes and fees in a sense are paid "involuntarily". The difference is often, if not always, one of degree and turns on many factors, including the right of taxing authorities to rely on objection, if there be resistance to payment, the likelihood that authentic resistance will be asserted, the un-

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* Plaintiffs in the *Five Boro* case were among those who brought the class action in the *Adlerstein* case to nullify the local law. The fees sought to be recovered in the *Five Boro* case were paid while the *Adlerstein* action was pending.

avoidable drastic impact of the taxes or fees on the claimant, and the impact on the public fisc, if revenues raised long ago and expended are subject to reimbursement. Surely one would expect motion picture distributors, and especially a corporation as large as claimant with its staff of lawyers, to protest if the fees were thought illegal. Indeed, the failure to protest indicates that there was no authentic resistance to making the minimal payments for the extensive procedures in licensing motion pictures whose gross yield would be massive compared to the trivial fees imposed.

Moreover, the fees as such have never been held illegal or excessive but on the contrary sustained, and the regulatory services which the fees financed have long ago been rendered and the cost undoubtedly passed on to the patrons of the films. The *Trans-Lux case* (14 N Y 2d 88, 380 U. S. 259, 16 N Y 2d 710, *supra*) and the *Freedman* case (380 U. S. 51, *supra*) each involved denial of a license for a motion picture and the denials were overturned because of the invalid procedure under the statute. On the other hand, the fees sought to be recovered in this case were reasonable tariffs for motion picture licensing and the films were actually licensed (*Matter of Connection Co.* v. *Regents,* 17 A D 2d 671, affd. 12 N Y 2d 779). Notably, in the *Freedman* case (380 U. S. 51, *supra*) the Supreme Court reiterated its prior holdings that motion pictures were properly subject to licensing and the payment of license fees. Indeed, Mr. Justice BRENNAN, on behalf of the court, suggested illustrative procedural means to implement a valid licensing statute (380 U. S., at pp. 60-61). In a similar context, and in the only reported case found deciding the issue of the recovery of license fees paid without protest under a motion picture licensing statute, the Pennsylvania Supreme Court denied

recovery for reasons analogous to those mentioned above (*Universal Film Exch.* v. *Board of Finance Revenue*, 409 Pa. 180, cert. den. 372 U. S. 958). Of particular significance to the Pennsylvania court were the long years of acquiescence with adequate opportunity to take legal action, the rendering of inspection services as a *quid pro quo*, the benefit to the industry, and the passing on of the costs of the license fees to the theatre-going public. (See, also, *Box Office Pictures* v. *Board of Finance & Revenue*, 402 Pa. 511, 515-519; *Paramount Film Distributing Corp* v. *Tracy*, 176 N. E. 2d 610, 618-621, affd. 118 Ohio App. Div. 29, affd. 175 Ohio St. 55.)

What has been said so far assumes, as the parties have assumed, that restitution is appropriate unless it can be shown that claimant paid its license fees voluntarily. But, if general principles of restitution were to be reached, even if one assumes involuntary or coerced payment, those principles do not support restitution.

The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Grombach Prods.* v. *Waring*, 293 N. Y. 609, 615; *American Sur. Co.* v. *Conner*, 251 N. Y. 1, 8-11; *Miller* v. *Schloss*, 218 N. Y. 400, 407; *Schauk* v. *Schuchman*, 212 N. Y. 352; Restatement, Restitution, § 1; 50 N. Y. Jur., Restitution, §§ 1, 3). Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice (50 N. Y. Jur. Restitution, § 7). Generally, courts will look to see if a benefit has been conferred on the defendant under mistake of fact, or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent (Restatement, Restitution, §§ 1, 142, esp. Comment *b*; *id.* § 155, incl. Comment *b*).

It is difficult to say that the State has received any benefit let alone unjust enrichment. The fees defrayed the cost of the licensing program, a program which, at least, was intended to further the interests of both the industry and the public. The statute was not a revenue measure, and, *inter alia*, it exacted a regulatory fee to support the program. The difference between regulatory fees and revenue imposts, the latter including unauthorized excessive regulatory fees paid involuntarily, also distinguishes this case from the *Five Boro* case (12 N Y 2d 146, *supra*).

Moreover, the funds have been disbursed long ago. Nor has the State acted tortiously or fraudulently in exacting the fees. The implications of this court's holding in *Trans-Lux* invalidating the statute for reasons distinct from the power to collect fees has already been noted. That the exactions were themselves proper and not tortious, fraudulent, or illegal, and that they have been consumed is significant. Generally, if a plaintiff's recovery will lead to an undue net loss to a defendant by reason of a changed position, as will often be the case when the funds have been disbursed, then the parties being equally innocent, recovery may be denied (*Ball* v. *Shepard*, 202 N. Y. 247, 253-254; *Matter of Herned*, 149 Misc. 476, 478-479 [Wingate, S.]; 44 N. Y. Jur., Payment, §§ 105-106; see, generally, Ann., Restitution—Payee's Change of Position, 40 ALR 2d 997).

In summary, the payment of license fees without protest was voluntary for purposes of recovery of moneys paid as fees or taxes; hence, no recovery for the fees collected without protest or other resistance may be allowed. Since a small percentage of fees were paid under protest between March and June, 1965, the matter should

be remanded so that such fees may be computed, and recovery allowed.

Accordingly, the order of the Appellate Division should be reversed, with one bill of costs, and the action remanded for further proceedings in accordance with this opinion.

Bergan, J. (dissenting). On March 15, 1965 the Supreme Court in *Matter of Trans-Lux Distr. Corp.* v. *Board of Regents* (380 U. S. 259) summarily, and on the authority of *Freedman* v. *Maryland* (380 U. S. 51) decided two weeks earlier, reversed the decision of this court in *Matter of Trans-Lux Distr. Corp.* v. *Board of Regents* (14 N Y 2d 88) which had sustained refusal by the Board of Regents to license a motion picture, and had again upheld the validity of the New York licensing statute (Education Law, tit. I, art. 3, part II).

Trans-Lux applied to this court in June, 1965 to amend the remittitur entered under the decision at 14 N Y 2d 88 to conform the judgment to the Supreme Court mandate and this motion was granted June 10 (16 N Y 2d 710). Specifically, the court directed that "the matter be remitted to the Supreme Court, Albany County, with directions to vacate its judgment entered April 24, 1964, and to enter a new judgment declaring and determining that Part II of article 3 of Title I of the Education Law violates the Fourteenth Amendment of the Constitution of the United States and is null and void" (16 N Y 2d, at p. 711).

In opposition to that motion the Board of Regents argued the general provisions of the statute survived the Supreme Court's decision and that the court did not "hold that the statute of the State of New York is un-

constitutional". This was an argument that the licensing and collection of the licensing fees could continue although the Regents must change its procedures.

This court's answer, as it has been observed, was a determination that the entire statute "is null and void", a decision embracing the fee provisions. This much must be said about the belief of the majority that the fees as such have never been held illegal.

It is not disputed claimant paid the State $128,322.50 in fees during the six-year period before June 10, 1965, either for licenses issued to it or to its parent corporation Paramount Pictures Corporation. The Court of Claims found claimant was entitled to $29,279 which was the amount claimant had paid in fees for licenses issued directly to it, but that it was not entitled to $99,025 which claimant itself had also paid as fees for licenses issued to its parent Paramount Pictures. The Appellate Division, by a divided court, modified this judgment to allow claimant the full amount of its claim, $128,322.50.

On the State's argument that a large part of the fees paid by claimant were not under protest, and, therefore, not recoverable because voluntarily paid, it is necessary to examine the two leading cases in this court in their impact on this problem and on each other.

In 1957 the court decided *Mercury Mach. Importing Corp.* v. *City of New York* (3 N Y 2d 418). This case involved actions to recover payments made by taxpayers on interstate business levied under the New York City General Business and Financial Tax Law. The tax in its effect on interstate commerce had been previously held invalid.

Since there had been no protest made, and the conditions of duress did not exist under which protest was

deemed unnecessary, i.e., "duress, where present liberty of person or immediate possession of needful goods is threatened by nonpayment" of the tax or where there was a resulting lien, the tax was held not under duress, and since not protested, could not be recovered (3 N Y 2d, at p. 425).

Five years later in 1962 the court decided *Five Boro Elec. Contrs. Assn.* v. *City of New York* (12 N Y 2d 146). It held that license fees paid by a number of electricians over a five-year period under a statute which had been held by this court invalid because excessive in amount and bearing no relation to the cost of licensing, could be recovered although paid by plaintiffs without protest.

To reach this result it became necessary for the court to distinguish *Mercury* (3 N Y 2d 418, *supra*) which it undertook to do. The ground of distinction was precisely laid down. No protest was needed, and there was, in effect, a resulting duress because "these electricians were placed in a situation where their only alternative was to submit to an illegal exaction or discontinue their businesses (*Swift Co.* v. *United States*, 111 U. S. 22, 28). They were not allowed to operate without licenses, nor could their licenses be renewed except by payment of excessive fees" (12 N Y 2d, at p. 149).

The court excused failure to protest the payment of fees even as to those made after there had been a judicial determination that the statute as applied was invalid. That decision, *Adlerstein* v. *City of New York* (11 Misc 2d 754, affd. 7 A D 2d 717, affd. 6 N Y 2d 740), was rendered at Special Term in April, 1958, and the fees allowed to be recovered were paid from 1954 through 1959 (12 N Y 2d, p. 147).

The ground for this was that even after *Adlerstein* (*supra*) was decided "unless they [licensees] had paid the excessive fees required for their licenses to do business they would have been prevented from earning a livelihood while that litigation was pending. The right to earn one's living and to engage in business is fundamental and its protection is necessary to the interests of society" (12 N Y 2d, at pp. 149-150).

Therefore, the rule of *Mercury* (3 N Y 2d 418, *supra*) was held not to apply to an invalid license requirement which, if not obeyed, would result in the loss of a right to engage in business. That exception to *Mercury* is exactly the case of the present claimant. There is at least as much "authentic resistance" to the payment of the claimant's license fees as there was in *Fire Boro* (12 N Y 2d 146, *supra*) and the actual protest came earlier in relation to judicial declarations of invalidity addressed to the respective statutes.

What seems decisive in the majority's summation of the grounds for decision here is that claimant's "payment of license fees without protest was voluntary for purposes of recovery of moneys paid as fees or taxes". On this aspect of the case, at least, *Fire Boro* (12 N Y 2d 146, *supra*) appears to be indistinguishable and it should be overruled or followed. The need for protest, and not the uses to which the fees were put, was decisive in *Fire Boro*. The rule for licensed electricians and licensed motion picture exhibitors should be pretty much the same.

Thus the difference between regulatory fees and revenue imposts played no part in the announced reasons for decision in *Fire Boro* and is not a ground to distinguish the present case. This court did not in *Adlerstein* (6 N Y 2d 740, *supra*) hold the electricians' fees so high as to become

a revenue impost: and *Fire Boro* did not consider this ground, but treated the actions as brought to "recover excess money" (12 N Y 2d, at pp. 147-148) under the *Adlerstein* holding that the fees were unconstitutionally excessive.

That the State used the proceeds of the license fees collected under the statute in the licensing operation itself does not for the purposes of this case distinguish it from one where the fee or tax is used for general State purposes. Here the program of inspection and licensing expressed in the statute was responsive to the State's belief in the value of censorship to protect morals and elevate public taste, and so in furtherance of a general public policy. No benefit to the business of motion picture exhibitors was intended or demonstrated in the experience with censorship.

Hence the impact of the fee on the licensee's business was not for the protection or assistance of the licensee or even to improve its service to the public, but rather to effectuate the purpose of public authority to censor.

Long experience with this type of censorship left its benefit to the public doubtful, and where approval of films was not granted routinely, the censor tended to act repressively against creative innovation. Ultimately censorship ran afoul of constitutional freedom of expression.

It is true, as the majority has observed, that an action for recovery for unjust enrichment or restitution should appeal to equity and good conscience and this principle ought to apply to an action such as the present one.

Here the good conscience in issue is that of the sovereign which collected the fees under the compulsion of a statute which the sovereign State itself, by its highest

court, advisedly held to be "null and void". It seems the part of fair dealing to turn the money back.

The sum is large for the taxpayers as well as the State. As Judge FULD noted in dissent in *Mercury* (3 N Y 2d 418, *supra*): "Modern and enlightened tax administration frowns upon the imposition of technical obstacles to the refunding of illegally collected taxes" (p. 433).

The order should be affirmed.

Judges BURKE, SCILEPPI and JASEN concur with Judge BREITEL; Judge BERGAN dissents and votes to affirm in a separate opinion in which Chief Judge FULD and Judge GIBSON concur.

Order reversed, with costs, and case remitted to the Court of Claims for further proceedings in accordance with the opinion herein.

EXHIBIT B

(Order of the Court of Claims on Remand)

FILED
Feb 13 1973

State Court of Claims
Albany, N. Y.

At a Term of the Court of Claims of the State of New York held in its Courtroom at the Justice Building, South Mall, in the County of Albany and City of Albany in said State on the 13th day of February 1973.

Present:

HON. MILTON ALPERT,
Judge.

PARAMOUNT FILM DISTRIBUTING CORPORATION,

Claimant,

— against —

THE STATE OF NEW YORK,

Defendant.

Exhibit B

ORDER

CLAIM NO. 45976

MOTION NO. M-15178

On February 13, 1973, the following papers, numbered 1 to 2, were read on motion by Claimant for an Order directing the entry of final judgment.

	Papers Numbered
Notice of Motion and Affidavit Annexed	1
Opposing Affidavit	2

Upon the foregoing papers, this motion is GRANTED.

The Court of Appeals, in *Paramount Film Distributing Corporation* v. *The State of New York*, 30 N.Y.2d 415 at page 422 directed that: ". . . [s]ince a small percentage of fees were paid under protest between March and June, 1965, the matter should be remanded so that such fees may be computed, and recovery allowed."

The matter is before the undersigned pursuant to such direction. Both parties agree that the fees paid under protest and for which recovery may be had is the sum of $341.

A judgment in the amount of $1,501.25 representing the State's costs on appeal, as allowed, has already been entered. Accordingly, in accordance with the direction of the Court of Appeals and without adversely affecting such judgment for costs, the Clerk of the Court is directed to enter a final judgment in favor of the Claimant in the sum of $341 together with appropriate interest.

Enter.

/s/ MILTON ALPERT
J.C.C.

Dated: February 13, 1973,
Albany, New York.

EXHIBIT C

(Judgment or Remittitur of the Court of Appeals)

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 8th day of June in the year of our Lord one thousand nine hundred and seventy-two, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

Remittitur June 8, 1972

3. No. 23. 72

PARAMOUNT FILM DISTRIBUTING CORPORATION,

Respondent,

vs.

THE STATE OF NEW YORK,

Appellant.

BE IT REMEMBERED, That on the 21st day of January in the year of our Lord one thousand nine hundred and

seventy-two, The State of New York, the appellant—in this cause, came here unto the Court of Appeals, by Louis J. Lefkowitz, Attorney General, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Paramount Film Distributing Corporation, the respondent—in said cause, afterwards appeared in said Court of Appeals by E. Compton Timberlake, its attorney.

Which said Notice of Appeal and the return thereto filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mrs. Grace K. Banoff, of counsel for the appellant—, and by Mr. John R. Davison, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed, with costs, and the case remitted to the Court of Claims for further proceedings in accordance with the opinion herein.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Court of Claims of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be reversed, with costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Court of Claims of the State of New York, before the Judges thereof, according to the form of the statute in such case made

and provided, to be enforced according to law, and which record now remains in said Court of Claims, before the Judges thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, JUNE 8, 1972.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

(SEAL)

EXHIBIT D

(Order of the Court of Appeals Denying Reargument and Granting Amendment of its Remittitur)

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-eighth day of September, A.D. 1972.

Present,

HON. STANLEY H. FULD,
Chief Judge, presiding.

Mo. No. 724

PARAMOUNT FILM DISTRIBUTING CORPORATION,

Respondent,

vs.

STATE OF NEW YORK,

Appellant.

A motion for reargument and to amend the remittitur in the above cause to this Court having heretofore been made upon the part of the respondent and papers having been submitted thereon and due deliberation having been thereupon had, it is

Exhibit D

ORDERED, that the said motion, insofar as it seeks re-argument, be and the same hereby is denied; and it is

ORDERED, that the said motion, insofar as it seeks amendment, be and the same hereby is granted. Return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether lack of a remedy in one proceeding rather than two to declare the licensing statute invalid and also to obtain a refund of licensing fees already paid violates the Due Process Clause of the Fourteenth Amendment. The Court of Appeals considered this issue and held that there was no denial of claimant's constitutional rights (30 NY 2d 415).

AND the Court of Claims hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

EXHIBIT E

(Final Judgment of Court of Claims on Remittitur)

STATE OF NEW YORK

COURT OF CLAIMS

Claim No. 45970

Motion M-15178

PARAMOUNT FILM DISTRIBUTING CORPORATION,

Claimant-Respondent,

—against—

THE STATE OF NEW YORK,

Appellant.

The State of New York having appealed to the Court of Appeals from the order of the Appellate Division, Third Department, entered herein in the office of the Clerk thereof on August 2, 1971 and the Court of Appeals having reversed, with costs, said order appealed from and, by its remittitur dated June 8, 1972, remanded the matter to this Court to determine the amount of fees paid by Paramount Film Distributing Corporation under protest and directed the grant of judgment to said Claimant against the State of New York for that amount and Claimant-Respondent having moved for an order directing entry of such a judgment, papers having been submitted thereon John R. Davison, Esq., of counsel, appearing for claim-

ant, and Grace K. Banoff, Esq., Assistant Attorney General, appearing for defendant and not opposing, and the Court (Alpert, J.) having entered an order herein on February 13, 1973 determining, on agreement of the parties, that the amount of fees paid under protest totaled the sum of $341.00 and directing entry of judgment in favor of Claimant against the State in that amount without affecting the judgment for costs entered herein on June 16, 1972;

NOW, THEREFORE, it is

ORDERED AND ADJUDGED that Claimant, Paramount Film Distributing Corporation be and it hereby is awarded Three Hundred Forty-One ($341.00) Dollars, with interest thereon, at the rate of four percent per annum from June 10, 1965 to June 25, 1971, and interest thereon at the rate of six percent per annum from June 25, 1971 to and inclusive of March 13, 1973, the date of entry of judgment herein, to wit: the sum of One Hundred Seventeen and 59/100 ($117.59) Dollars, amounting in all to the sum of Four Hundred Fifty-Eight and 59/100 ($458.59) Dollars, and that the claim herein for refund of other fees be and the same hereby is dismissed.

DATED: Albany, New York
March 13, 1973

DAVID B. KLINGMAN
Deputy Chief Clerk of the
Court of Claims

EXHIBIT F

(Non-Final Judgment of Court of Claims Entered June 16, 1972)

STATE OF NEW YORK

COURT OF CLAIMS

Claim No. 45976

Motion M-10554

PARAMOUNT FILM DISTRIBUTING CORPORATION,

Claimant-Respondent,

—against—

THE STATE OF NEW YORK,

Appellant.

[The above-named appellant The State of New York, having appealed to the Court of Appeals from an Order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the Clerk's Office thereof on August 2, 1971, and a Judgment of the Court of Claims entered in the Clerk's Office thereof on July 22, 1969, from which the Claimant-Respondent cross-appealed, in the sum of $37,751.71, inclusive of interest (Lengyel, J.); and said appeal having been argued by the Honorable Louis J. Lefkowitz, Attorney General, by Grace K. Banoff, Esq., of counsel for the Appellant, and by E. Compton Timberlake, Esq., attorney for claimant by John R. Davison, Esq., of counsel, and after due deliberation the Court of

Exhibit F

Appeals having handed down its decision on June 8, 1972, reversing the Order appealed from, with costs, and remitting the case to the Court of Claims for further proceedings in accordance with opinion by Breitel, J., all concurring except Bergan, J., who dissents and votes to affirm in an opinion in which Fuld, Ch. J., and Gibson, J., concur; and an Order having been entered in the Court of Appeals on June 8, 1972, in accordance with the said decision.]*

And the original record on appeal together with a certified copy of the Order of the Court of Appeals entered in the Clerk's Office thereof on June 8, 1972, having been filed in the Clerk's Office of the Court of Claims on June 15, 1972, and the costs on appeal having been taxed by the Deputy Chief Clerk of the Court of Claims on June 16, 1972 in the sum of $1,501.25, it is

Ordered and Adjudged that the Order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the Clerk's Office thereof on August 2, 1971, modifying the judgment appealed from, on the law and the facts, so as to increase the award from $29,297 to $128,322.50 plus appropriate interest, and, as so modified, affirmed, and further ordering that the order appealed from by the State of New York vacating a subpoena *duces tecum* be, and the same is affirmed with one bill of costs; be and the same is reversed, with costs, and the case remitted to the Court of Claims for further proceedings in accordance with the opinion, and it is further

Ordered and Adjudged that The State of New York, above-named appellant, recover herein against Paramount Film Distributing Corporation the sum of One Thousand

---

* Matter within brackets marked VACATED. Actually superseded by amended judgment.

Exhibit F

Five Hundred One and 25/100 ($1,501.25) Dollars, its costs on appeal.

Dated: Albany, New York
June 16, 1972

(Illegible)
Deputy Chief Clerk of the
Court of Claims

EXHIBIT G

(Non-Final Judgment of Court of Claims Entered October 27, 1972)

STATE OF NEW YORK

COURT OF CLAIMS

Claim No. 45976

Motion M-10554

PARAMOUNT FILM DISTRIBUTING CORPORATION,

Claimant-Respondent,

—against—

THE STATE OF NEW YORK,

Appellant.

The above-named appellant, The State of New York, having appealed to the Court of Appeals from an Order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the Clerk's Office thereof on August 2, 1971, and a Judgment of the Court of Claims entered in the Clerk's Office thereof on July 22, 1969, from which the Claimant-Respondent cross-appealed, in the sum of $37,751.71, inclusive of interest (Lengyel, J.); and said appeal having been argued by the Honorable Louis J. Lefkowitz, Attorney General, by Grace K. Banoff, Esq., of counsel for the Appellant, and by E. Compton Timberlake, Esq., attorney for claimant by John R. Davison, Esq.,

of counsel, and after due deliberation the Court of Appeals having handed down its decision on June 8, 1972, reversing the Order appealed from, with costs, and remitting the case to the Court of Claims for further proceedings in accordance with opinion by Breitel, J., all concurring except Bergan, J., who dissents and votes to affirm in an opinion in which Fuld, Ch. J., and Gibson, J., concur; and an Order having been entered in the Court of Appeals on June 8, 1972, in accordance with the said decision,

And the original record on appeal together with a certified copy of the Order of the Court of Appeals entered in the Clerk's Office thereof on June 8, 1972, having been filed in the Clerk's Office of the Court of Claims on June 15, 1972, and the costs on appeal having been taxed by the Deputy Chief Clerk of the Court of Claims on June 16, 1972 in the sum of $1,501.25,

And judgment in accordance having been entered in the office of the Clerk of the Court of Claims on June 16, 1972, modifying the judgment appealed from, on the law and the facts, so as to increase the award from $29,297 to $128,322.50 plus appropriate interest, and as so modified, affirmed; and further ordering that the order appealed from by the State of New York vacating a subpoena *duces tecum* be, and the same was affirmed with one bill of costs; and the same reversed, with costs, and the case was remitted to the Court of Claims for further proceedings in accordance with the opinion, and further ordering that the above-named appellant, recover against Paramount Film Distributing Corporation the sum of $1,501.25, its costs on appeal.

And thereafter a motion for reargument and to amend the remittitur having been submitted, this Court (Court

of Appeals) on September 28, 1972, having denied the motion as to reargument and granted the motion as to amendment of the remittitur, this remittitur is hereby amended by adding thereto the following:

> "Upon the appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether lack of a remedy in one proceeding rather than two to declare the licensing statute invalid and also to obtain a refund of licensing fees already paid violates the due process clause of the Fourteenth Amendment. The Court of Appeals considered this issue and held that there was no denial of claimant's constitutional rights (30 N Y 2d 415)."

and, it is

ORDERED AND ADJUDGED that the judgment entered on June 16, 1972 in the office of the Clerk of the Court of Claims, be and the same hereby is amended to include the following:

> "Upon the appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether lack of a remedy in one proceeding rather than two to declare the licensing statute invalid and also to obtain a refund of licensing fees already paid violates the due process clause of the Fourteenth Amendment. The Court of Appeals considered this issue and held that there was no denial of claimant's constitutional rights (30 N Y 2d 415)."

and it is further

ORDERED AND ADJUDGED that in all other respects the judgment entered in the Court of Claims on June 16, 1972 be and the same is hereby affirmed.

Dated: Albany, New York
October 27, 1972

DAVID B. KLINGAMAN
Deputy Chief Clerk of the
Court of Claims

FILE COPY

FILED
JUL 5 1973
MICHAEL RODAK, JR., CLERK

(126-D)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972
No. 72-1666

PARAMOUNT FILM DISTRIBUTING CORPORATION,

Petitioner,

—against—

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO CERTIORARI TO THE NEW YORK STATE COURT OF CLAIMS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972
No. 72-1666

PARAMOUNT FILM DISTRIBUTING CORPORATION,

Petitioner,

—against—

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO CERTIORARI TO THE NEW YORK STATE COURT OF CLAIMS

STATEMENT

The State of New York submits this brief in opposition to the petition of Paramount Film Distributing Corporation for a writ of certiorari "to the New York State Court of Claims to review the non-final judgment of the New York State Court of Appeals." In reversing the decision of the Appellate Division of the New York Supreme Court, Third Judicial Department, the New York Court of Appeals on June 8, 1972 denied recovery of motion picture license fees paid without protest (and allowed refund of fees paid under protest). On September 28, 1972 the New York Court of Appeals amended its remittitur by adding the following:

> "Upon the appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether lack of a remedy in one proceeding rather than two to declare the licensing statute invalid and also to obtain a refund of licensing fees already paid violates the Due Process Clause of the Fourteenth Amendment. The Court of Appeals considered this issue and held that there was no denial of claimant's constitutional rights (30 NY 2d 415)."

QUESTIONS PRESENTED

1. Is this petition (docketed June 6, 1973) timely? (The New York Court of Appeals amended its remittitur on September 28, 1972 to state that it had passed on a Federal question.)

2. Does petitioner raise a substantial Federal question?

FACTS

From the time of its incorporation in 1939 up to March 15, 1965 claimant, a Delaware corporation which distributed motion pictures throughout the United States, from time-to-time applied for and paid for film licenses without any objection or protest and without any challenge to the constitutionality of the New York motion picture licensing statute.

Claimant was never denied a license to exhibit any of its films.

The constitutionality of the New York motion picture licensing statute (Education Law §§ 120-132) was on various occasions the subject of litigation. *Jos. Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952); *Kingsley Pictures Corp.* v. *Regents*, 360 U.S. 684 (1959); *Matter of Connection Company* v. *Regents*, 17 [N.Y.] A D 2d 671 (3d Dept., 1962), aff'd. 12 N Y 2d 779. In none of these cases was the New York motion picture licensing statute held to be unconstitutional.

On March 1, 1965 this Court held a Maryland motion picture licensing statute unconstitutional on the ground that it prohibited exhibition of a film pending judicial review of denial of a motion picture license. *Freedman* v. *Maryland*, 380 U.S. 51. On March 15, 1965 this Court held the New York motion picture licensing statute unconstitutional. *Matter of Trans-Lux Distributing Corp.* v. *Board of Regents*, 380 U.S. 259.

Thereafter petitioner filed this claim to recover motion picture licensing fees paid between June 10, 1959 and June 10, 1965.

THE COURT OF APPEALS DECISION

On June 8, 1972 the majority opinion of the New York Court of Appeals denied claimant recovery of motion picture license fees paid without protest and stated:

> "In summary, the payment of license fees without protest was voluntary for purposes of recovery of moneys paid as fees or taxes; hence, no recovery for the fees collected without protest or other resistance may be allowed. Since a small percentage of fees were paid under protest between March and June, 1965, *the matter should be remanded so that such fees may be computed*, and recovery allowed." (Emphasis added.)

On September 28, 1972 the New York Court of Appeals amended its remittitur to state:

> "Upon the appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether lack of a remedy in one proceeding rather than two to declare the licensing statute invalid and also to obtain a refund of licensing fees already paid violates the Due Process Clause of the Fourteenth Amendment. The Court of Appeals considered this issue and held that there was no denial of claimant's constitutional rights. (30 N Y 2d 415)."

ARGUMENT

POINT I

CERTIORARI SHOULD BE DENIED BECAUSE IT WAS NOT SOUGHT WITHIN 90 DAYS OF THE COURT OF APPEALS' DECISION WHICH FINALLY DETERMINED ALL FEDERAL QUESTIONS IN THE CASE AND WHICH AMENDED THE REMITTITUR TO STATE THAT IT HAD CONSIDERED A FEDERAL QUESTION.

A petition for certiorari must be brought within 90 days of the final judgment rendered by the highest court of a State in which a decision could be had. 28 U.S.C §§ 1257, 2101(c).

As stated above, the June 8, 1972 opinion of the majority of the New York Court of Appeals denied recovery for fees paid without protest and stated:

> "Since a small percentage of fees were paid under protest between March and June, 1965, *the matter should be remanded so that such fees may be computed* and recovery allowed." (Emphasis added.)

Thus the June 8, 1972 opinion determined all issues in this lawsuit except ministerial computation of fees paid under protest.

On September 28, 1972 the Court of Appeals denied reargument and amended the remittitur to state that a Federal question had been passed upon.

On February 13, 1973 the New York Court of Claims entered an order which computed the damages. That order stated:

> "Both parties agree that the fees paid under protest and for which recovery may be had is the sum of $341.00." (Petition, Ex. B, p. 27)

Since that computation was made on consent, it would of course not be subject to appeal.

We point out that the petition docketed in this Court June 6, 1973 seeks certiorari more than 90 days after computation, as

directed in the remand, of the fees paid under protest. Petitioner selects March 13, 1973, the date of entry of final judgment pursuant to the February 13, 1973 order of the Court of Claims, as the date on which his time to apply certiorari commenced to run.

Respondent urges that the matter of refund of payments made without protest was finally determined on September 28, 1972 and that all Federal questions were then decided. All that remained was a ministerial computation of damages based on payments enumerated in the affirmed findings of fact. (R 415-416; Findings 9-12; Bill of Particulars, R 536).*

A judgment of a state court of last resort reversing a lower court decision and remanding the case for further proceedings satisfies the requisite finality for purposes of review before the Supreme Court of the United States when all Federal rights asserted are disposed of, notwithstanding the remand for further proceedings. *Radio Station WOW* v. *Johnson*, 326 U.S. 120 (1945). The test is whether the record shows that the order of the state appellate court has in fact fully adjudicated all rights and that the adjudication is not subject to further review by a state court. *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 72 (1946). In *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971), this Court held final for purposes of review the granting of a *temporary* injunction by an Illinois court. In a footnote (p. 418) this Court wrote:

> "Nor is there any indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing."

That principle applies more strongly in the instant case since the computation of fees paid under protest on remand could have no effect upon the result reached in the Court of Appeals with respect to the fees paid without protest.

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* Parenthetical references beginning with the letter R refer to pages of the Record on Appeal in the New York Court of Appeals.

Since petitioner's time started to run with the amendment of the remittitur on September 28, 1972, the petition must be denied as not timely. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

POINT II

THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

A. Petitioner does not present a due process question.

The remittitur of the state court of last resort is not controlling as to whether or not a Federal question is presented. *Honeyman* v. *Hanan*, 300 U.S. 14 (1936); *Benz* v. *N.Y.S. Thruway Authority*, 369 U.S. 147 (1967).

In the instant case the question certified by the New York Court of Appeals was whether lack of a remedy in one proceeding rather than two to declare the licensing statute invalid and to obtain a refund of fees already paid violates the due process clause of the Fourteenth Amendment.

First, we disagree with petitioner's contention that before *Freedman* v. *Maryland*, 380 U.S. 51 (1965), and *Matter of Trans-Lux Distributing Corp.* v. *Board of Regents*, 380 U.S. 259 (1965), two proceedings would have been necessary for it to litigate its right to recover payments made under an allegedly void statute. In *Guaranty Trust Co.* v. *State of New York*, 299 N.Y. 295 (1949), the New York Court of Appeals held that a bank which had paid an excise tax (unemployment insurance contributions) under compulsion of a void statute had a single remedy in the New York State Court of Claims.* The New York Court of Appeals wrote (pp. 301-302):

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* In that case, the Court of Appeals held (p. 300) "claimant's cause of action arose immediately that it paid the tax" and dismissed the claim as untimely. In the instant case, the Court of Appeals rejected the State's argument based on the holding in *Guaranty*.

> "Agreeing again with the Court of Claims, we hold that subdivision 6 of section 570 of the Labor Law does not establish an exclusive remedy for obtaining a refund of taxes paid under compulsion of a void statute. The claimant, therefore, had the right to seek restitution in this proceeding. (*New York R. T. Corp.* v. *City of New York*, 275 N.Y. 258, 264)."

In *Travelers Indemnity Co.* v. *State of New York*, 33 A D 2d 127 (3d Dept., 1969), affd. 28 N Y 2d 561, the New York Appellate Division and the Court of Appeals rejected the State's contention that the New York Court of Claims lacked jurisdiction of a claim for money because claimant insurance company had not established its right to the refund in a separate proceeding in State Supreme Court. The Third Department wrote (p. 128):

> "The fact that in deciding the issue of respondent's entitlement to a refund the Court of Claims had to pass upon the validity of a determination made by the Superintendent of Insurance does not affect this conclusion. In comparable situations two separate actions have not been required (see *China City Corp.* v. *State of New York*, 51 Misc 2d 429) and, of course, such a position favors efficient judicial administration."

Likewise in *Benz* v. *N.Y.S. Thruway Authority*, *supra*, this Court noted that what the New York Court of Appeals had decided was that the New York Court of Claims had jurisdiction to set aside an agreement settling a condemnation claim as incidental to determination of a claim for damages for condemnation. Applying the holdings in the *Guaranty Trust* case, the *Travelers Indemnity* case and the *Benz* case, it should follow that had claimant filed a claim for refund of motion picture license fees, the Court of Claims should have reviewed the validity of the motion picture statute as an element of that claim. To hold otherwise is to say that a claimant may elect to pursue his remedy in the Court of Claims when it supports claimant's position, but that the State may not assert as a defense that the Court of Claims could have determined all of the present petitioner's contentions in one action as the New York Court of Appeals held in *Guaranty*. Such a dual standard is untenable.

We note further that although claimant's petition sets forth its contentions with respect to the merits, it has made no argument with respect to the Federal question set forth in the amendment to the remittitur, namely, whether claimant's alleged need to bring two proceedings instead of one is a denial of due process.

In *Yakus* v. *United States*, 321 U.S. 414 (1944), this Court held that splitting the trial for violation of an administrative regulation by committing the issue of validity to an administrative agency and the issue of violation to a court did not violate the demands of due process. This Court wrote (p. 444):

> "And we are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity, or which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue."

If determination of issues in a criminal matter may be split between tribunals without denial of due process, petitioner's thesis that it needed two tribunals in a civil matter presents no due process question.

Respondent submits, therefore, that case law supports its position that petitioner could have submitted all its issues in one claim in the Court of Claims in accordance with the cases cited above and furthermore, that even if two proceedings were necessary for a complete remedy, that does not present a constitutional issue.

B. Petitioner presented no substantial Federal question in the New York Court of Appeals.

As shown in subdivision A of this point, *supra*, the remittitur of the state court of last resort is not controlling as to whether or not a Federal question is presented.

Petitioner's point headings in its brief in the New York Court of Appeals demonstrate the absence of argument of a Federal question in that Court. Those headings were:

Point I — The movie licensing law was authoritatively declared unconstitutional on June 10, 1965 — not on March 15, 1965.

Point II — Payments of fees for pre-censorship of films exacted under penalty of criminal prosecution were not "voluntary" as a matter of law.

Point III — Claimant was aggrieved by the imposition of fees to finance an unconstitutional program of pre-censorship of films and considerations of retroactivity have no bearing in an action for refund.

Point IV — Every fee as to which refund has been directed was actually paid by claimant pursuant to its obligation to pay all license fees out of its own funds under the contract giving claimant the exclusive right to distribute every single Paramount picture in New York State.

Point V — The subpoena duces tecum was properly vacated.

These headings reveal the absence of Federal issues in this lawsuit.

The issue petitioner does argue in the instant petition, namely, its right to recover motion picture license fees paid without protest and without commencing proceedings to challenge the motion picture statute does not present a basis for certiorari. In *Universal Film Exchange* v. *Board of Finance and Revenue*, 409 Pa. 180 (Sup. Ct. of Pa., 1962), cert. den. 372 U.S. 958,* in which petitioner herein was one of eight petitioners, this Court rejected similar arguments.

Respondent submits, therefore, that certiorari should be denied.

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* October Term, 1962, Case No. 818.

CONCLUSION

CERTIORARI SHOULD BE DENIED.

Dated: June 29, 1973

Respectfully submitted,

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Supreme Court of the United States

October Term, 1972.

No. 72-1666.

PARAMOUNT FILM DISTRIBUTING CORPORATION,
Petitioner,

v.

STATE OF NEW YORK,
Respondent.

Reply Brief in Support of Petition for Certiorari.

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IN THE

Supreme Court of the United States

October Term, 1972.

PARAMOUNT FILM DISTRIBUTING CORPORATION,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

No. 72-16666

Petitioner's Brief in Reply to Respondent's Brief in Opposition to Certiorari.

Finality.

Contrary to the contention of respondent the judgment and opinion of the New York Court of Appeals decided nothing in any final fashion. This was an action for a certain sum of money—a claim for refund of motion picture license fees paid to the State under a film censorship statute subsequently held wholly unconstitutional. Until recovery was allowed, entirely denied or partly denied by an award of a lesser sum, no finality could attach. Instead the Court of Appeals merely laid down guidelines for a final determination by the Court of Claims and remanded the claim.

Inherent in that decision the Court of Appeals has itself certified that there was presented before it and necessarily passed upon by it a question under the constitution of the United States in that the Court of

Appeals adjudged that the fee payments not expressly made under protest were voluntary as a matter of law in the absence of prior resistence to payment by resort to judicial action.

This requirement of prior judicial action was imposed in spite of the circumstance that there was no single remedy and no single forum available in New York by which or in which petitioner could obtain a refund of the fees paid. The unavailability of a single adequate remedy and competent forum was expressly certified to this Court as posing a due process question under the Fourteenth Amendment to the Constitution of the United States but in rejecting dismissal of the entire claim for lateness, in that same decision, it was acknowledged that no cause of action for refund had accrued. Nevertheless, petitioner's recovery has been barred, for the voluntary payment as a matter of law theory, based only on petitioner's failure to sue on non-accrued causes of action.

The argument that the order of the New York Court of Claims entered February 13, 1973 finalized the decision of the Court of Appeals is equally without reason. That order appears as Exhibit B attached to the Petition for Certiorari (p. 26). It is merely an interim finding on consent of the amount of fees paid under express protest with direction to enter a judgment on that finding. No disposition whatsoever was made of the rest of the claim and until the principal part of petitioner's claim was dismissed by the judgment entered in the Court of Claims on March 13, 1973 (Exhibit E, p. 33) there had been no final determination as to which the petitioner was aggrieved. And both of these steps, it will be noted, were compelled or carried out by the petitioner in the absence of action by the State Attorney General.

The Federal Question.

The New York Court of Appeals has authoritatively ruled herein in amending its remittitur that State law required the bringing of at least two actions before two different courts in order to procure a declaration of invalidity as to the New York film pre-censorship law and then to procure a refund of the fees paid for such pre-censorship. The case cited by respondent (*Guaranty Trust Co. v. State of New York*, 299 N. Y. 292) holds nothing to the contrary. There the New York Labor Law imposed an excise tax on employers and within its related provisions (Section 570) authorized not only administrative and judicial challenge but also refunds. In *Matter of Bank of Manhattan Co. v. Murphy* (267 App. Div. 456, aff'd 293 N. Y. 515), a proceeding brought in accordance with that statutory authorization, the tax was held invalid and a refund directed. Guaranty Trust Company, claimant in the cited case, did not seek judicial review within the four months allowed but later filed a claim for refund in the Court of Claims, based, just as here, on the previous declaration of invalidity. The New York courts merely held that Guaranty Trust Company was not bound to seek refund under the judicial review proceeding authorized in the statute but could pursue a remedy in the Court of Claims based on that prior declaration of invalidity. The ultimate decision held, however, that, because Guaranty Trust Company had an adequate remedy under the Labor Law, its causes of action accrued upon payment of the tax and its claim was filed too late in the Court of Claims under the time limitation for filing claims.

In the present case, the Court of Appeals rejected dismissal for lateness, necessarily on the ground petitioner's cause of action did not accrue until the statute here involved was declared invalid because of the un-

availability of an adequate remedy before a competent forum.

It is an affront to the fair play sense of due process and equal protection to say that a suitor is barred from asserting his claim under a not yet accrued cause of action upon the ground that voluntary payments should be imputed from the failure to sue. The harm is accentuated when it is done pursuant to a striving to save some aura of validity to a pre-censorship statute already deemed wholly unconstitutional under the mandate of this Court and, when, unlike less affluent persons, petitioner is deprived of its statutory right to assert the non-voluntary nature of its fee payments through mistake of law, duress and business compulsion.

Raising the Federal Question Below.

In the posture of the State's preliminary motion in the trial court to dismiss the claim for lateness, the identical claims of denial of due process and equal protection under the Fourteenth Amendment to the Constitution of the United States were presented to the New York Court of Claims and the New York Supreme Court, Appellate Division, Third Department. (See excerpts from Briefs submitted to those counts attached hereto as Appendix 1 and Appendix 2.)

There the petitioner here argued that its claim could not be deemed to have accrued for any purpose but, of course, the argument was particularized to meet the thrust of the asserted bar of time limitations (*Atchafalaya Co. v. Williams Co.*, 258 U. S. 190; *Wilson v. Iseminger*, 185 U. S. 55, 62). The doctrine invoked, the points of argument that the authorities are the same with respect to the bar of time limitations and the bar of voluntary payment. It is just as much a denial of due process

to bar recovery on a claim for refund of fees on the ground of voluntary payment as it is for lateness where, because no cause of action had accrued for lack of a remedy and a forum, the petitioner never had a chance to assert its claim before the bar was imposed.

In its brief on the argument in the New York Court of Appeals, Paramount Film Distributing Corporation offered to, and did with the Court's permission, submit its brief before the Appellate Division (see excerpt from Petitioner's brief in the Court of Appeals attached hereto as Appendix 3.)

The Federal questions asserted here were, therefore, argued before and considered by all of the courts who heard and decided this matter below. The Court of Appeals certified that the question was presented to it and was necessarily passed upon by it.

CONCLUSION.

The petition for certiorari should be granted.

Respectfully submitted,

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% Paramount Film Distributing Corp.,
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New York, New York 10023

Signed JOHN R. DAVISON,
491 State Street,
Albany, New York 12203,
Counsel for Petitioner.

Certificate of Service.

I hereby certify that on this day of , 1973 three copies of this Reply Brief were mailed, postage prepaid, to Honorable Louis J. Lefkowitz, Attorney General of the State of New York, the Capitol, Albany, New York, Counsel for the Respondent. I further certify that all parties required to be served have been served.

Signed JOHN R. DAVISON
491 State Street
Albany, New York 12203
Counsel for Petitioner

APPENDIX 1.

Excerpt From Claimant's Brief in Opposition to the Preliminary Motion to Dismiss in the New York Court of Claims.

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Point IV.

Imposition of the bar of time limitations as urged by the State would be a denial of due process.

Until the decision of the Supreme Court in *Freedman v. Maryland*, 380 U. S. 51 (1965), any attack by claimant on the constitutionality of the scheme of censorship embodied in the New York Education Law and the fees imposed in connection therewith would have been futile. Not only had the Supreme Court of the United States, in its prior decisions, refused to hold the statutory scheme embodied therein unconstitutional, but the New York courts had specifically upheld the imposition of the fee schedule. (See, *supra*, pp. 2-3). Indeed even after the *Freedman* decision, and after the reversal by the U. S. Supreme Court in the *Trans-Lux* case, the New York Department of Education still took the position that the rationale of

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those cases did not invalidate the New York statute (*Mtr. of Ess Pee Bee Realty Corp. v. Regents*, 16 N. Y. 2d 536). It was not therefore, until the decision of the New York Court of Appeals in the *Trans-Lux* case, *supra*, page 18, that the assertion of a claim for refund could be considered anything but a futile gesture.

Badly stated, it is the position of the State of New York that at a time when no one could have known that a cause of action existed or asserted his rights thereunder, the statute of limitations destroyed any right of recovery. A rule of law based upon any such theory must necessarily deprive claimant of due process, in violation not only of the Fourteenth Amendment to the Federal Constitution but also the analogous provision of the Constitution of the State of New York. For it is well settled that a claimant may not be deprived of a cause of action by limitations unless it has been given a reasonable period of time within which to assert it. *Atchafalaya Co., v. William Co.*, 258 U. S. 190; *Wilson v. Iseminger*, 185 U. S. 55, 62; *Hastings v. Byllesby & Co. (Granberg)*, 293 N. Y. 413, 419 (1944); *People v. Cohen*, 245 N. Y. 419 (1927); *Halstead v. Silberstein*, 196 N. Y. 1, 15 (1909); *Gilbert v. Ackerman*, 159 N. Y. 118 (1899).

We respectfully submit that no cause of action for refunds could "accrue" until the decision of the Court of Appeals in *Trans-Lux*.

APPENDIX 2.

Excerpt From Claimant-Respondent's Brief in the Appellate Division, Third Department on the Appeal From the Order of the Court of Claims Denying the Motion to Dismiss.

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Point IV.

Imposition of the bar of time limitations as urged by the State would be a denial of due process and equal protection.

Until the decision of the Supreme Court in *Freedman v. Maryland*, 380 U. S. 51 (1965), any attack by claimant

on the constitutionality of the scheme of censorship embodied in the New York Education Law and the fees imposed in connection therewith would have been futile. Not only had the Supreme Court of the United States, in its prior decisions, refused to hold the statutory scheme embodied therein unconstitutional (See pages 34 to 38, *supra*), but the New York Courts had specifically upheld the imposition of the fee schedule (*Matter of Connection Co. v. Regents*, 17 A. D. 2d 671; *Pathe Exchange, Inc., v. Cobb*, 202 App. Div. 450, aff'd 236 N. Y. 539). Indeed, even after the *Freedman* decision, and after the reversal by the U. S. Supreme Court in the *Trans-Lux* case, the New York Department of Education still took the position that the rationale of those cases did not invalidate the New York statute (*Mtr. of Ess Pee Bee Realty Corp. v. Regents*, 16 N. Y. 2d 536). It was not, therefore, until the decision of the New York Court of Appeals in the *Trans-Lux* case (*Trans-Lux Distributing Corp. v. Board of Regents*, 16 N. Y. 2d 710), that the assertion of a claim for refund could be considered anything but a futile gesture.

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Baldy stated, it is the position of the State of New York that at a time when no one could have known that a cause of action existed or could have asserted his rights thereunder, the statute of limitations destroyed any right of recovery. A rule of law based upon any such theory must necessarily deprive claimant of due process, in violation not only of the Fourteenth Amendment to the Federal Constitution but also the analogous provision of the Constitution of the State of New York (Const. Art. 1, §6), for it is well settled that a claimant may not be deprived of a cause of action by limitations unless it has been given a reasonable period of time within which to assert it. *Atchafalaya Co. v. William Co.*,

258 U. S. 190; *Wilson v. Iseminger*, 185 U. S. 55, 62; *Hastings v. Byllesby & Co. (Granberg)*, 293 N. Y. 413, 419; *People v. Cohen*, 245 N. Y. 419; *Halstead v. Silberstein*, 196 N. Y. 1, 15; *Gilbert v. Ackerman*, 159 N. Y. 118.

The Federal and State Constitutions prohibit any other result.

APPENDIX 3.

Excerpts From Claimant-Respondent's Brief on the Appeal in the Court of Appeals.

VI.

(To cover points only raised below.)

Inasmuch as the position of the State seems radically to have changed in this court from the points argued upon the two appeals to the Appellate

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Division, a single copy of claimant's 3 briefs filed on those appeals is submitted herewith lest points not briefed herein be relied on by Appellant on the oral argument of this appeal. Since this is a civil appeal, however, appellant should be limited to the points argued in its main brief.

Page 5:

(2) the appropriate statute of limitations for filing a claim does not commence to run until a cause of action accrues. That does not take place until claimant has an

adequate remedy before a court of competent jurisdiction and, therefore, the date of accrual here was June 10, 1965.

It is claimant's position, which has been adopted below, that neither the Supreme Court nor the Court of Claims had jurisdiction to provide a complete remedy in any action claimant might bring until after the offending statute had been declared void. The Supreme Court had power to declare the statute unconstitutional but no power to grant a refund of illegally exacted fees (*Matter of Adler, Inc., v. Noyes*, 285 N. Y. 34), and the Court of Claims had no equity jurisdiction to declare the statute void (*Psaty v. Duryea*, 306

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N. Y. 413). Until a remedy is available by a single action, no accrual occurs (*O'Hara v. State*, 112 N. Y. 146; *Hanger v. Abbott*, 73 U. S. 532, 541).